LETCHUMANAN VELAYUTHAM

v.

ENG MEE YONG & ORS.

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CIVIL SUIT NO. 288 OF 1975]
23 JUNE 1987

LAND LAW: *Sale and purchase agreement for a piece of land - Deposit and further part payment balance of purchase price not paid - Deposit forfeited - Whether further part payment also forfeitable.*

The plaintiff agreed to purchase from the defendants a piece of land for RM827,656.25 and he paid them a sum of RM97,765.62 by way of deposit and part payment. He paid a further sum of RM30,000 in part payment of the purchase price. As the plaintiff was unable to pay the balance of the purchase price within the stipulated period, the defendants forfeited the above-mentioned two sums. The plaintiff admitted that the defendants had rightfully forfeited the deposit but claimed relief against the forfeiture of the further part payment of RM30,000 on the grounds that this was a penalty.

The defendants claimed that the sum of RM30,000 was a deposit and therefore forfeitable when the agreement was terminated by them on the plaintiff's failure to pay the balance of the purchase price. The issue was whether the said sum of RM30,000 was a deposit or a part payment towards the purchase price.

Held:

[1] Following *Bhai Panna Singh & Ors. v. Bhai Arjun Singh*, the defendant must prove the damage he has suffered. In the instant case, the defendants have not proved any damage; in fact it was the other way round.

[2] The defendants have forfeited RM97,765.62, the deposit paid by the plaintiff. Upon the plaintiff's failure to complete the purchase, the defendants have sold the subject land to another purchaser for more than three times the price for which they had agreed to sell the land to the plaintiff. So, the defendants have been more than reasonably compensated by the plaintiff's breach of the agreement.

[3] Therefore the defendants are not allowed to forfeit the further part payment of RM30,000.

[4] Plaintiff's claim allowed with costs except that the interest on the judgment sum shall be from 13 January 1984.

[Claim allowed with costs.]

Case referred to:
Bhai Panna Singh & Ors. v. Bhai Arjun Singh [1929] AIR PC 179

Legislation referred to:
Contracts Act 1950, ss. 74, 75
Evidence Act 1950, ss. 91, 92 (b), 145

For the plaintiff - P. Devadas; M/s. Veloo & Co.
For the defendants - Isabella de Silva (Suhendran Sockanathan with him); M/s. Chooi & Co.

JUDGMENT

Mustapha Hussain J:

This is an old case which started in 1975. The issue of caveat of this case went right up to the Privy Council in London and became the *locus classicus* of the law of caveat.

The plaintiff brought this suit with a statement of claim against the defendants in October 1975. The original statement of claim was subsequently amended on 13 January 1984, some eight years after the writ was filed.

In his amended statement of claim the plaintiff stated that on 28 June 1974 he entered into an agreement with the defendants whereby he agreed to purchase from the defendants the land held under Grant No. 2457 for Lot No. 593 in the Mukim of Ampangan, district of Seremban at a cost of RM827,656.25, and that he paid the defendants a sum of RM97,765.62 by way of deposit and part payment of the purchase price of the said land. He said he paid a further sum of RM30,000 in part payment of the purchase price. The plaintiff said further that as he was unable to pay the balance of the purchase price of RM699,890.63 by 28 September 1974, the defendants terminated the agreement and forfeited the deposit of RM97,765.62 as well as the part payment of RM30,000 paid towards the purchase price. The plaintiff admitted in his statement of claim that the defendants had rightfully forfeited the deposit but claimed relief against the forfeiture of the further sum of RM30,000 on the grounds that this was a penalty.

The other claim by the plaintiff of expenses incurred by him in building the access road to the said land was abandoned at the beginning of the hearing.

On the other hand, the defendants in their statement of defence (which was also amended on 19 January 1984), averred that the plaintiff had entered into a sale and purchase agreement earlier on 16 December 1973, whereby he agreed to purchase from the defendants the said land for the price of RM777,656.25 and as a result of the plaintiff's failure to complete the purchase by 16 June 1974, the defendants were entitled to forfeit the deposit sum of RM77,765.62 paid by the plaintiff according to that agreement and they did forfeit that deposit on 24 June 1974.

The defendants further averred that the plaintiff had offered to pay RM50,000 extra as consideration for entering into a new agreement for the purchase of the same land, with the deposit paid under the earlier agreement to be reinstated as deposit for the new agreement which amounted to RM97,765.62. The defendants agreed in their statement of defence that they then entered into the new agreement dated 28 June 1974 and the sum of RM77.765.62 forfeited by them on 24 June 1974 formed part of the sum of RM97,765.62 as deposit under the new agreement (see para. 4 of the statement of defence). It is to be noted here that the sum of RM77,765.62 plus the consideration of RM50,000 extra payment as averred above should total RM127,765.62 and not RM97,765.62.

In para. 5 and 6 of the statement of defence, the defendants averred that the sum of RM30,000 claimed by the plaintiff was part of the consideration the plaintiff agreed to pay for reinstatement of the forfeited deposit under the earlier agreement to be credited towards the deposit under the new agreement. The sum of RM30,000 being the balance of consideration for the entry into the new agreement was not a penalty but the price the plaintiff agreed to pay the defendants for crediting the deposit forfeited under the earlier agreement towards the purchase price of the said land under the new agreement and it was also to compensate the defendants for interest lost by giving the plaintiff an additional three months to complete the sale under the new agreement.

The defendants contended further that the sum of RM97,765.62 together with the sum of RM30,000 was insufficient compensation in the event of breach of the new agreement by reason of the fact that in reality only RM50,000 was forfeited under the new agreement as that was all that the plaintiff had paid under the new agreement.

At the hearing of the suit the plaintiff himself testified whilst for the defence, the 2nd named defendant gave evidence. After going through the evidence including the very able written submissions of both Counsel for plaintiff and defendants, the Court will now proceed first, to make a ruling on the introduction of extrinsic evidence to explain the effects of the agreement in question, i.e. the agreement dated 28 June 1974 together with the affidavit of the plaintiff affirmed on 4 November 1975 in relation to the caveat aspect of this case (that went up to the Privy Council). Counsel for the defendants at the trial had sought to introduce this extrinsic evidence which was strenuously objected to by Counsel for the plaintiff and the Court had reserved its ruling until the conclusion of the hearing to consider fully the law and its implications. The Court also decided at that stage that in the final analysis if it came to the conclusion that the extrinsic part of the evidence was inadmissible, then the affidavit of the plaintiff referred to above would not be taken into consideration and would be excluded in arriving at the judgment. The Court adopted this procedure in view of the provisions of s. 145 of Evidence Act 1950, solely for the purpose of the plaintiff being cross-examined by Counsel for the defendants on the credibility of the plaintiff, which is permissible, but not for introducing the said affidavit as evidence for any other purpose.

Now, the agreement dated 28 June 1974 in question, is an agreement prepared by a very able lawyer, and I take it that the various terms and conditions of the agreement had been fully explained to the parties to the agreement by their respective lawyers. It is a very formal written agreement. To quote the statement of defence, amended para. 4 thereof stated "... **which contain all the agreed terms ...**"

Section 91 and s. 92 of the Evidence Act 1950 are pertinent and unless the said affidavit of the plaintiff can come within the ambit of one of the provisos to s. 92 of the Act, especially proviso (b), which is the only one pertinent to be considered here, it cannot be admitted Proviso (b) reads:

> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s. 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that-
>
> (a) ...
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document;

Here the contention of the defendants is that the plaintiff agreed to pay RM50,000 extra as consideration for the extension of time by another three months and for the reinstatement of the deposit forfeited under the earlier or first agreement as the deposit under the new agreement. As can be seen from the contents of the new agreement, there is no reference to the RM50,000 anywhere in this second agreement and there is also no reference to the extension of time by another three months therein. And then, the degree of formality of the

second agreement, which in my view,is an outright fresh agreement and a very formal document. Clearly, proviso (b) of s. 92 of the Evidence Act does not apply here. And as such I rule that the said affidavit of the plaintiff dated 4 November 1975, **is inadmissible.** Of course, it can be used **solely** to refer the plaintiff to his previous statement and probably to discredit him under s. 145 of the Evidence Act. Even the first agreement dated 16 December 1973 is inadmissible simply for the reason that the new or second agreement dated 28 June 1974 stated in the preamble that the parties had mutually agreed to terminate that first agreement and to enter into a fresh formal agreement.

We are therefore now left with only the agreement dated 28 June 1974 to be considered which in the view of this Court is not only a formal agreement but contains all the terms which are clear.

The issue before this Court is whether the sum of RM30,000 claimed by the plaintiff was a deposit or a part payment towards the purchase price of the said land. Clause 1 of the agreement stated that the vendors (defendants) had received RM97,765.62 upon signing of the agreement as deposit and part payment of the purchase price, and clause 2 of the said agreement stated very clearly that this sum of RM30,000 was towards the account of the purchase price as part payment and failure to pay this RM30,000 by 29 July 1974 would result in the deposit referred to in clause 1 to be forfeited. This means, without doubt, in clear and unambiguous language in the proper construction of the agreement itself, that the RM30,000 paid by the plaintiff pursuant to clause 2 of the agreement is Not a deposit but Part Payment Of The Purchase Price.

The next point relevant here is clause 5 of the agreement, which stated that "If the Purchaser (plaintiff) shall fail to pay the balance of the purchase price in accordance with clause 3, the deposit referred to in clause 1 and **whatever payments made thereafter** shall be irrecoverably forfeited to the vendors (defendants) as agreed and liquidated damages for breach of contract". (the emphasis is mine). The words "whatever payments made thereafter" in clause 5 clearly meant the RM30,000 mentioned in clause 2. The question immediately arising here is whether this is caught by s. 75 of the Contracts Act 1950.

There are two forfeiture clauses in the agreement. First, in clause 2 of the agreement, it is stated that if the purchaser fails to pay the RM30,000 on or before 29 July 1974 towards the account of the purchase price, the deposit of RM97,765.62 mentioned in clause 1 shall be irrecoverably forfeited.

Second, in clause 5 of the agreement, it is stated that if the purchaser fails to pay the balance of the purchase price on or before 28 September 1974, the deposit of RM97,765.62 and whatever payments made thereafter, will irrecoverably be forfeited to the Vendors.

Can these two forfeiture clauses, i.e. clause 2 and clause 5, be the liquidated damages that the parties agreed to?

We may have one clause stipulating forfeiture as can be seen in clause 2. But when we have two clauses stipulating an extra forfeiture, this cannot but be a penalty; more so when it is stated "**whatever payments thereafter**" are to be forfeited. It is to be noted that the word used "payments" is in the plural.

In *Bhai Panna Singh & Ors. v. Bhai Arjun Singh* [1929] AIR PC 179 Lord Atkin held that s. 74 (which is in *pari materia* with our s. 75 of the Contracts Act) disentitled a party from recovering simpliciter the sum fixed in the contract whether penalty or liquidated damages. Defendant must prove the damage he has suffered.

In our case here, the 2nd defendant who gave evidence on behalf of the defendants, has not proved any damage, in fact it was the other way round.

What if the plaintiff had paid, say, RM650,000 towards the purchase price (RM827,656.25) leaving a small portion only as balance? Can all these payments then be forfeited under clause 5 of the agreement? Certainly this is a penalty caught by s. 75 of the Contracts Act, and the defendants here can only be compensated reasonably. What then, is the reasonable compensation to be received by the defendants? The defendants have forfeited RM97,765.62, the deposit paid by the plaintiff, which is not in dispute. Upon the plaintiff's failure to complete the purchase, the defendants have sold the subject land to another purchaser for more than three times the price for which they had agreed to sell the land to the plaintiff. Surely, the defendants have been more than reasonably compensated by the plaintiff's breach of the agreement. Anyway, there was no evidence led on behalf of the defendants at the trial that they have not been reasonably compensated. It is difficult to ignore that by the plaintiff's breach, by plaintiff's failure to complete the purchase, the defendants have made very much more than they bargained for and have made substantial gains.

Therefore in the above premises the defendants are not allowed to forfeit this payment of RM30,000.

The Court therefore allows the plaintiff's claim as prayed with cost except that the interest on the judgment sum shall be from 13 January 1984.

Also found at [1987] 2 CLJ 229